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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973.

No. .

KOMMANVITTSELSKAPET HARWI (ROLF WIGAND)
Owner of the Motor Vessel GERWI
and
BERGENSSKIBSASSURANSEFORENING,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF FOR PETITIONERS.

The Memorandum of the United States in Opposition contains significant inaccuracies.

Footnote 4 on page 4 is factually incorrect in the respects noted below.

Footnote 4 states in part:

> "The GERWI had to pass not only through the Torresdale Range on its way to Morrisville, but also through, among others, Keystone Range, Landreth Range, Newbold Range and Whitehill Range, all of which had less than 28 feet of water according to the May 3 statement (Pet. App. A7)."

The GERWI did not pass through the Newbold or Whitehill Ranges. These ranges are beyond the Fairless Terminal at Morrisville, which was the GERWI's destination. The entrance to the Fairless Terminal is at the Junction of Penn Channel and Newbold Range. It is therefore incorrect to state that the GERWI passed through Newbold Range or Whitehill Range.

As to Landreth Range ("Project") the May 3 channel depth statement reports depths in excess of 36.3 feet which were sufficient for the GERWI.*

The "old" or existing Landreth Channel labeled "(A)" on the May 3 statement also had sufficient depths for the GERWI in the middle half of the channel to the right channel edge. The depth statement reports a minimum depth of 26.3 feet. With a plus 4 foot flood tide the vessel was proceeding in a minimum depth of 30.3 feet. These depths were proved adequate for the GERWI, drawing 27 feet 11 inches (F/F No. 6 Pet. App. A3).

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* Any depth shown on the May 3 statement is the minimum at mean low water to which the four foot flood tide then prevailing must be added for the time of the transit of the GERWI (F/F 9 Pet. App. A3).

It cannot be presumed that the GERWI pilot would navigate on his own left outside quarter where insufficient water was shown on the May 3 statement.

The government's inappropriate comments as to the existing depths in Keystone Range (a short range) are answered on pages 17-18 of the Petition.

No proof as to the Keystone Range was offered by the Government at the trial. It was not proved that the pilot relied on the May 3 statement for Keystone depths. The proof at the trial related to his reliance as to the depths in Torresdale where the vessel grounded.

Any consideration of Keystone inferred by the Circuit Court is outside the record. It was common knowledge that the Keystone depths shown in the statement had been greatly increased as a result of dredging and that the Keystone "project" channel had to be used for navigation since its center line was coincident with that of the "existing" range.

It was improper for the Circuit Court on consideration of the Government's Petition for Rehearing to conclude without any evidence below that the depths shown on the May 3 statement for Keystone indicate that the pilot "never would have left Philadelphia had he been relying on the May 3 statement". This is a conclusion unsupported by the record.

In any event it has never been argued before in this case that reliance to be effective requires reliance on every feature of the May 3 statement.

Obviously, the requirement for reliance as to liability is met if any feature of the document is relied upon to the damage of the vessel.

The pilot's testimony contains uncontracted evidence substantiating his reliance on L-9, the May 3 Channel Depth Statement for Torresdale Range (Lappe 106a, 107a, 110a, 113a, 138-139a).

The Court by its own specific questions during the pilot's testimony fully revealed its understanding that the pilot relied on the May 3 statement, among other basic sources of information.

During our interrogation about another document (a Local Notice to Mariners) the Court, in fact, insisted that the witness was relying on L-9 and not the document about which he was being questioned.

> "Q. Now, we are looking at a notice which is dated January 12, 1963, containing depths from an Army survey dated December 4, 1962, and this is dated prior to the grounding of the "Gerwi" on May 23, 1963, so did you have this depth information in the form of the Local Notices to Mariners prior to the grounding?
>
> A. I had this one (indicates), yes, sir, right here.
>
> MR. MCGOVERN: Your Honor, may we identify——
>
> THE COURT: Now, I am not going to put up with this much longer. The witness has told you, he has waived that—I think it is Exhibit No. 7, or is it 9? [L-9]
>
> MR. PALMER: He told me he got a local notice.
>
> THE COURT: Well, he told the Court that he had that, and that is what he relied on.
>
> Now, don't ask me to find when this case is concluded that he relied on something which he says he didn't. He has waived that paper [L-9] two or three times and showed it to you standing there and said, 'This is what I had. This other thing comes out later. This is what I had. This is what I relied on.'" (130-131a)

At pages 121-122 (Original Testimony) the Trial Court again confirmed the unequivocal testimony of the pilot that he relied on L-9, the May 3 Channel Depth (Appendix to Reply Brief, pages 5-6, *infra*).

The second split decision of the Third Circuit (A41-47), by ignoring the uncontradicted and overwhelming weight of the evidence of the pilot's reliance on the May 3 statement, has necessarily compelled the Government to resort to the illusory arguments about Keystone, Landreth, Newbold, and Whitehill Ranges, not supported by a scintilla of evidence in the record of the case.

Judge Masterson in the first split decision for the Third Circuit (A26-33), reversing the Trial Court and holding the United States liable, clearly perceived the justice and national importance of confirming the responsibility of the United States for negligent publication of navigation information distributed for the specific purpose of inducing reliance by navigators.

Respectfully submitted,

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APPENDIX TO REPLY BRIEF.

[Original Testimony Page 121.]

* * *

Mr. Palmer: If Your Honor please, before I go into some other matters that Mr. McGovern and I are mutually interested in, I would like to clarify one thing.

By Mr. Palmer:

Q. Look at L-9, the May 3 channel statement, 1963, all right?

Now, tell me what channel those depths for Torresdale Range relate to you as a navigator.

A. They relate to the channel with the range lights.

Q. The columns you are referring to are which ones?

A. I am referring to the columns on the extreme right, five columns.

Q. The five columns under what heading?

A. "Minimum depth in channel entering from seaward."

The Court: Mr. Palmer, I hate to interrupt you,

[Original Testimony Page 122—App. Page 139a.]

but we have been all over this. I am fully aware that he said he had this thing and he relied on the 29.9. He gave 4 more feet for the tide. We went into all that in detail.

Mr. Palmer: I think it is now clear, Your Honor. I was afraid that it had been misunderstood this morning, but I see that it is very clear.

The Court: It is perfectly clear to me.

Mr. Palmer: Thank you, Your Honor.

I will proceed now to cover——

The Court: I am not saying that that is a fact, but that is the witness's testimony.

Mr. Palmer: Yes, Your Honor.

The Court: He went into it in great detail.

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